

ADMINISTRATIVE APPEALS BOARD
ADMINISTRATIVE APPEAL NO. 17/2018

BETWEEN

Dr BRIAN KING

Appellant

and

PRIVACY COMMISSIONER FOR
PERSONAL DATA

Respondent

Coram: Administrative Appeals Board
Mr Douglas Lam Tak-yip, SC (Deputy Chairman)
Mr Micky Yip Tik-bun (Member)
Ms Christine Yung Wai-chi (Member)

Date of Hearing: 6 May 2019

Date of Handing down Written Decision with Reasons: 21 July 2021

DECISION

A. Introduction and Background

1. By a Notice of Appeal dated 9 November 2018, the Appellant, Dr Brian King (“**Dr King**”), appeals to the Administrative Appeals Board (the “**Board**”) pursuant to section 39(4) of the Personal Data (Privacy) Ordinance (Cap 486) (the “**PDPO**”) against a decision of the Privacy Commissioner for Personal Data (the “**Commissioner**”) dated 12 October 2018 (the “**Commissioner’s Decision**”), whereby the Commissioner decided to terminate his investigation into Dr King’s

complaint pursuant to Section 39(2)(d) of the PDPO and paragraph 8(e) of the Commissioner’s Complaint Handling Policy (the “**CHP**”).

2. Dr King’s complaints to the Commissioner concerned the refusal of the Director of Housing (the “**Director**”) to comply with two data access requests made pursuant to section 18(1)(a) of the Personal Data (Privacy) Ordinance (Cap 486) (the “**PDPO**”), the first dated 23 March 2018 (“**DAR 1**”) and the second dated 22 April 2018 (“**DAR 2**”)¹.

3. Section 18(1) provides that:

“(1) An individual, or a relevant person on behalf of an individual, may make a request –

(a) To be informed by a data user whether the data user holds personal data of which the individual is the data subject...”

Section 18(3) further provides that:

“A data access request under paragraph (a) of subsection (1) may, in the absence of evidence to the contrary, be treated as being a data access request under both paragraphs of that subsection, and the provisions of this Ordinance... shall be construed accordingly...”

4. The appeal was heard before the Board on 6 May 2019 and was attended by Dr King in person, Mr Ng, Legal Counsel on behalf of the Commissioner (“**Mr Ng**”), and Mr Cheng, Associate of Messrs. Fairbairn Catley Low and Kong (“**Mr Cheng**”) on behalf of the Director.

¹ The Director denied having received DAR 2. See below.

5. At the hearing before the Board and with the Board's encouragement, Dr King and the Director were able to reach an amicable resolution in respect of DAR 1 (see below). Dr King also indicated that he would no longer pursue his complaint in respect of DAR 2, as the Director's position was that he had never received DAR 2, and Dr King was unable to provide a copy to the Commissioner for his investigations.

6. In the circumstances, it is unnecessary for this Board to address at length the merits of this appeal. However, as a number of potentially significant issues had been raised, the Board wishes to make some brief observations for future reference and guidance to the Director and the Commissioner.

7. The background of the matter is largely undisputed and set out in the Commissioner's Decision, the Commissioner's Statement relating to his Decision (in response to Dr King's Notice of Appeal) and the Director's written submissions before this Board. In summary:

- (1) Dr King was a licensee of Po Tin Interim Housing from April 2015 to August 2018.
- (2) On 23 March 2018, Dr King made DAR 1 by completing a standard form entitled "*Personal Data (Privacy) Ordinance Data Access Request Form*" (the "**Form**") and submitting it to the Housing Department's Tuen Mun North District Tenancy Office (the "**TMN Office**"):
 - (a) In Part II of the Form entitled "*Data Subject Particulars of the Data Subject making this data access request*", Dr King

filled in his name in English and Chinese and in the section “*Personal identifier, e.g. Hong Kong Identity Card number / passport number or other identification number previously assigned by the Data User (if any, such as student number, staff number, patient number, account number, membership number or other reference number)*”, Dr King provided, inter alia, his HKID number.

- (b) In footnote 3 of the Form (applicable to Part II of the Form), it is provided that:

“For Data Subject who is Hong Kong Identity Card holder. Please note that the information may assist the Data User to retrieve or locate the Requested Data. The identity card number needs not be provided in this Form if you have reasonable grounds to believe that this will not be necessary for the unique identification of the Data Subject by the Data User in the circumstances.”

- (c) Part IV of the Form provided that: “*The data access request is made under section 18(1) of the PDPO for the following personal data of the Data Subject, except those specifically excluded under Part V of this Form. Description of Requested Data:*”. Dr King filled in the following information:

“Contents of TKO-S-089925; Contents of TKO-C-044715; Contents of E/KNM/MA/1131; Contents of E/9POT/7/2313”

(the “**Data Reference Codes**”)

- (d) Further, in Part VI of the Form, Dr King specifically stated that he was merely requesting the Director to inform him whether he held the personal data (as opposed to requesting to be supplied a copy of the requested data).
- (3) On 13 April 2018, the TMN Office wrote to Dr King as follows (the “**April 13 Interview Request**”):

“有關「你查詢個人資料」一事，本處現邀請你於 2018 年 4 月 20 日上午 11 時前來屯門北區租約事務管理處（屯門富泰邨服務設施大廈 5 樓）面談，如你欲更改時間，可致電 26440201 聯絡何先生。”

(English translation: “In relation to the matter of your data access request, this office invites you for an interview on 20 April 2018 at 11 am at the [TMN Office]. If you wish to change the time, please telephone 2644 0201 to contact with Mr Ho.”)

- (4) Dr King did not respond to the April 13 Interview Request and did not attend the interview at the proposed date and time.
- (5) On 26 April 2018, the Housing Department Kowloon West & Sai Kung District Tenancy Management Office (the “**KWS Office**”) wrote to Dr King refusing DAR 1 (the “**April 26 Refusal**”):

“Please be informed that we can only release the information to the data subject or “a relevant person” under the [PDPO]. Since you fail to furnish us the copy of your Hong Kong Identity Card, we cannot confirm whether you are the data subject. Such that, we cannot proceed your [DAR 1]...” (emphasis added)

- (6) Curiously, notwithstanding the April 26 Refusal, on 27 April 2018, the TMN Office wrote a letter similar to the April 13 Interview Request save that the proposed date for the interview was on 4 May 2018 (the “**April 27 Interview Request**”). Again, Dr King did not respond to the request and did not attend the requested interview.
- (7) On 7 August 2018, Dr King lodged a complaint with the Commissioner in respect of the April 26 Refusal.
- (8) On 24 September 2018, the TMN Office wrote to Dr King as follows (the “**Purported September 24 Refusal**”):

“I refer to [DAR 1] and [the April 13 and 27 Interview Requests].

This office had examined the above [request] and found that your signature on it was different from that on the Occupation Licence of [omitted] of Po Tin Interim Housing and the description of the requested data in Part IV of [DAR 1] was unclear. Since you had not attached your identity proof, we could not proceed with your request. In order to verify your data request, we had sent you [the April 13 and 27 Interview Requests] to invite you for interviews, but you did not turn up for the two interviews as schedule [sic]. Until now, you have not contacted us in respect of the captioned subject.

Since you did not approach us to provide further information to clarify the description of your requested data and provide your identity proof, this office is unable to satisfy [sic] that you are the identity of the requestor and unable to clarify with you about the description of the requested data stated in your [request]. In view of the above, we regret to inform you that your above data access request was refused...”
(emphasis added)

- (9) On 12 October 2018, the Commissioner issued his Decision with reasons, the crux of which is found in paragraphs 14 to 17:

“14. The Housing Department, being the data user, must ensure that a copy of the personal data requested in a data access request is only provided to a person entitled to exercise the right to issue the relevant data access request. In the present case, you had not provided your identity proof to the Housing Department, and your signature on the DAR form was different from the one in the Housing Department’s official record. In order to protect the interest of the data subject, the Housing Department was obliged to ascertain the identity of the requestor, and you as the requestor owed a duty to provide your identity proof to satisfy the Housing Department. We consider that the matter could have been resolved if you had attended TMN Office as suggested by the Housing Department and presented your identification document for verification...

15. You claimed that you had submitted [DAR 2] while the Housing Department denied having received the same. We have no information to ascertain the truth.

16. In any event, if you wish to exercise your data access rights under the [PDPO], you may consider submitting a fresh DAR, together with your identity proof, to the Housing Department.

17. In the light of the above, we decide not to pursue your complaint further under section 39(2)(d) of the [PDPO]. This is in accordance with paragraph 8(e)... of our “Complaint Handling Policy” (emphasis added)

B. Grounds of Appeal

8. Dr King's grounds of appeal in respect of DAR 1, as set out in his Notice of Appeal dated 9 November 2018, may be summarised as follows:

- (1) He never received the April 26 Refusal from the KWS Office;
- (2) He has reasonably satisfied the Director as to his identity; and
- (3) The description of data requested in DAR 1 was reasonably sufficient for the Director to locate the personal data to which the request related.

C. Relevant Principles and Legislation

The PDPO

9. The Commissioner's power to terminate an investigation and the complainant's right of appeal are set out in Section 39 of the PDPO, which provides that inter alia:

...

- (2) The Commissioner may refuse to carry out or decide to terminate an investigation initiated by a complaint if he is of the opinion that, having regard to all the circumstances of the case-
 - (a) the complaint, or a complaint of a substantially similar nature, has previously initiated an investigation as a result of which the Commissioner was of the opinion that there had been no contravention of a requirement under this Ordinance;
 - (b) the act or practice specified in the complaint is trivial;

- (c) the complaint is frivolous or vexatious or is not made in good faith;
- (ca) the primary subject matter of the complaint, as shown by the act or practice specified in it, is not related to privacy of individuals in relation to personal data; or
- (d) any investigation or further investigation is for any other reason unnecessary.

...

(3A) If the Commissioner decides to terminate an investigation initiated by a complaint before its completion, the Commissioner must, as soon as practicable by notice in writing served on the complainant accompanied by a copy of subsection (4), inform the complainant—

- (a) of the decision; and
- (b) of the reasons for the decision.

(4) An appeal may be made to the Administrative Appeals Board-

- (a) against any refusal or termination specified in a notice under subsection (3) or (3A); and
- (b) by the complainant on whom the notice was served (or, if the complainant is a relevant person, the individual in respect of whom the complainant is such a person, or either).

10. The conduct of proceedings before this Board is set out in section 21 of the Administrative Appeals Board Ordinance (Cap 442) (the “AABO”) which provides that inter alia:

- (1) For the purposes of an appeal, the Board may:

...

- (j) subject to subsection (2), confirm, vary or reverse the decision that is appealed against or substitute therefor such other decision or make such other order as it may think fit;
- (2) The Board, in the exercise of its powers under subsection (1)(j), shall have regard to any statement of policy lodged by the respondent with the Secretary under section 11(2)(a)(ii), if it is satisfied that, at the time of the making of the decision being the subject of the appeal, the appellant was or could reasonably have been expected to be aware of the policy.
- (3) The Board, on the determination of any appeal, may order that the case being the subject of the appeal as so determined be sent back to the respondent for the consideration by the respondent of such matter as the Board may order.

11. Hence, an appeal before this Board is by way of a *de novo* hearing and determination, and the Board may confirm, vary or reverse the Commissioner's decision as it thinks fit, or alternatively, the Board may remit the case back to the Commissioner for reconsideration. In making its determination, the Board is required, however, to have regard to any statement of policy lodged by the Commissioner with the secretary of the Board, after having been served with the notice of appeal pursuant to section 10 of the AABO.

12. There is no dispute that the statement of policy referred to in section 21(2) of the AABO includes the CHP. Paragraph 8 of the CHP provides that inter alia:

Section 39(1) and (2) of the Ordinance contain various grounds on which the Commissioner may exercise his discretion to refuse to carry out or decide to terminate an investigation. In applying some of those grounds, the [Commissioner's] policy is as follows:

...

In addition, an investigation or further investigation may be considered unnecessary if:

- (e) after preliminary enquiry by the [the Commissioner], there is no *prima facie* evidence of any contravention of the requirements under the [PDPO];
- ...
- (g) the complainant and party complained against are able or should be able to resolve the dispute between them without intervention by the [Commissioner];
- (h) given the conciliation by the [Commissioner], remedial action taken by the party complained against or other practical circumstances, the investigation or further investigation of the case cannot reasonably be expected to bring about a more satisfactory result...

13. The relevant subsections of Section 18 of the PDPO have already been set out above.

D. Discussion

14. As mentioned above, the parties have reached an amicable resolution to this appeal. In particular, the Director accepted that there was no longer by this stage any issue as to Dr Brian King's identity. Further, after some clarification by Dr King as to the meaning of the Data Reference Codes, the Director agreed that he would ascertain from his files whether he held any personal data relating to Dr King and the Data Reference Codes.

15. Had the parties not been able to reach a resolution, however, the Board's view is that it would have allowed the appeal and directed the Commissioner to continue his investigation into Dr King's complaint, for the following brief reasons.

16. First of all, as Mr Cheng fairly accepted at the hearing: (1) the April 26 Refusal (issued by the KWS Office) constituted a definitive refusal of DAR 1 by the Director; and (2) the April 27 Interview Request (issued by the TMN Office), which was issued *after* the April 26 Refusal was the result of an “administrative error”.

17. It follows, in the Board’s view, that the reasons in the Purported September 24 Refusal, which (1) was issued some 5 months later and only after the Commissioner’s investigation had commenced and (2) introduced for the first time new grounds of refusal; should be given limited weight by the Board in determining the correctness of the April 26 Refusal. In any event, the reasons for Commissioner’s Decision were concerned solely with the April 26 Refusal.

18. With respect to the Director and the Commissioner, notwithstanding the valiant submissions of Mr Cheng and Mr Ng, the reason given in the April 26 Refusal, namely, that the Director could not proceed with DAR 1 as Dr King had “failed to furnish” a copy of his HKID, was plainly wrong and cannot stand:

- (1) First, it is clear from the Form that an applicant was not requested or required to furnish a copy of his HKID card. Indeed, as made clear on the Form, the provision of the applicant’s HKID number was not a mandatory requirement – merely that such information “may assist the Data User to retrieve or locate the Requested Data”. There was no suggestion and certainly no requirement to enclose a copy of the requestor’s HKID card.
- (2) Nothing in the PDPO requires the applicant to furnish a copy of his HKID in making a request under section 18. Both Mr Cheng and

Mr Ng sought to place heavy reliance on section 20(1) of the PDPO, which provides that inter alia:

“A data user shall refuse to comply with a data access request—

(a) if the data user is not supplied with such information as the data user may reasonably require—

(i) in order to satisfy the data user as to the identity of the requestor...”

(3) As Mr Cheng and Mr Ng accepted, however, furnishing a copy of the requestor’s HKID card was not the only method by which the identity of a requestor may be ascertained or verified. Mr Cheng submitted that in the Director’s experience, it was “commonplace” for applicants voluntarily to attach a copy of his or her HKID. With respect, this is utterly irrelevant. Even if it were the case that it was “commonplace” for applicants to do so (and there was in fact no evidence to that effect), there was no way that Dr King would have known about this, still less that he was somehow *expected or required* to do so, failing which, his data access request, which is a statutory right under the PDPO, would be denied.

(4) Indeed, the Director never requested Dr King to furnish a copy of his HKID card between the date of DAR 1 and the April 26 Refusal. The only communication between the Director and Dr King was the April 13 Interview Request, which gave no indication as to the purpose of the interview nor the fact that the Director wished for Dr King to furnish a copy of his HKID. The Director also made no mention, in contrast to the Purported September 24 Refusal, that he

had queries as to Dr King's identity due to the fact that his signature on DAR 1 differed from that in the Director's files.

- (5) Mr Cheng submitted that had Dr King complied with the April 13 Interview Request, he would have known about the Director's concerns and would have been able to satisfy the Director as to his identity.
- (6) We have no hesitation rejecting such a contention.
- (7) First, the April 13 Interview Request gave no indication at all as to the purpose of the interview or that the interview was intended to resolve the Director's query as to Dr King's identity. Section 20(1)(a) specifically refers to "such information as the data user may *reasonably require*...". Presumably, such information would have been requested on the Form, and in any event, it would have been incumbent upon the Director to indicate what additional information was reasonably required for Dr King to confirm his identity. It was fully within Dr King's prerogative not to attend any interview with the Director, the purpose of which was not even stated.
- (8) Mr Cheng and Mr Ng invited us to read the opening words in the April 13 Interview Request "in context", namely, "有關「你查詢個人資料」一事..." ("In relation to the matter of your data access request..."). With respect, there is nothing we can see from these words which would or should have enlightened Dr King that the purpose of the requested interview was to assist the Director to confirm his identity.

- (9) In any event, as Mr Cheng and Mr Ng conceded, there were other ways in which Dr King could have confirmed his identity.

19. With respect to the Director, what he should have done, and indeed what any reasonable and responsible Government department should have done, was to explain clearly to Dr King that he had some queries as to Dr King's identity, and to provide the reasons for his queries, namely, that there was a discrepancy in his signature on the Form and that on the Director's file. Dr King could then have made an informed decision on how to resolve the Director's queries and to meet the requirements of section 20(1)(a), whether this was by attending in person to show his HKID card, to provide another signature, or some other reasonable method to confirm his identity.

20. As the issue of Dr King's identity was the only issue raised in the Commissioner's Decision, the Board takes the view that his decision to terminate his investigation, on the grounds in paragraph 8(e) of the CHP that, "*...after preliminary enquiry by the [Commissioner], there is no prima facie evidence of any contravention of the requirements under the [PDPO]*" cannot be correct. There plainly was a contravention of the PDPO by the Director.

21. Had the parties not been able to reach an amicable resolution of Dr King's complaint and this appeal, the Board would have reversed the Commissioner's Decision to terminate his investigation under section 39(2)(d) of the PDPO.

22. However, given that the parties have now been able to resolve their dispute, and in the light of this Decision setting out the opinion of the Board, it is in our view unnecessary for any further investigation by the Commissioner. In the

circumstances, we would find that the investigation should be terminated not on ground 8(e) but rather on grounds 8(g) and (h) of the CHP.

E. Conclusion

23. For the reasons above, we make no order on this appeal. We thank all parties for their assistance.

(signed)

(Mr Douglas Lam Tak-yip, SC)

Deputy Chairman

Administrative Appeals Board